it was before, an award, so the former section does not give power to turn the debt appearing in the settled list into a judgment but merely gives the Official Assignee power to issue execution for the amount of the debt appearing in the settled list, as if judgment had been entered for such amount in favour of the Official Assignee, but leaves the debt what it was before, that is a debt and nothing more. The settling of a person's name and the amount of his debt upon a list of debtors under section 32 of the Ordinance does not therefore constitute a final judgment for the purposes of section 3(1)(i) of the Ordinance.

S. AYADURAI v. LIM HYE

[O.C.J. (Ismail Khan J.) April 18, 1959]

[K.L.—Civil Suit No. 407 of 1957]

Contract — Sale of land — Initial deposit pending sub-division — Stipulation as to time for subsequent deposit of total balance — Failure of purchaser to deposit balance at or before expiration of notice — Default not wilful — Time not essence of contract — Contracts (Malay States) Ordinance, 1950, s.56(1).

Vendor and Purchaser — Contract for sale of defined portion of vacant land — Completion after two weeks' notice by vendor of issue of registered title — Express stipulation for forfeiture of initial deposit on failure to deposit total balance purchase price at or before expiration of notice — Default not wilful — Tender of balance by way of further deposit within reasonable time — Whether vendor entitled to forfeit initial deposit.

Sale of land — Specific performance — Stipulation for forfeiture on default — Default not wilful — Purchaser's right to specific performance.

This action arose out of an agreement made in 1955 whereby the defendant agreed to sell and the plaintiff agreed to purchase a defined portion of land upon sub-division thereof for the sum of $7,150 upon certain terms and conditions. A sum of $3,650 was deposited with the defendant initially. Clause 2 of the agreement provides: "On the issue of new titles in respect of Lot No. 1 the vendor shall execute in favour of the purchaser or his nominee a registrable memorandum of transfer of the land comprised in the said Lot No. 1 on payment to the vendor's Solicitors of the balance of Dollars Three thousand five hundred ($3,500) due for the said lot. Provided always that if the purchaser does not deposit the balance of $3,500 with the vendor's Solicitors within fourteen (14) days of the receipt of notice from the vendor of issue of new titles for the said lot I the sum of Dollars Three thousand six hundred and fifty ($3,650) now deposited by the purchaser with the vendor shall be forfeited."

When on August 1, 1957 the Solicitor for the defendant notified the plaintiff of the issue of the new title and required the plaintiff to deposit with him the balance within 14 days, the plaintiff requested to be allowed to pay the required deposit after he could recover some loan, but this was turned down and on September 3 he again wrote to the Solicitor asking for a further "6 months' time to 'settle' the amount." The following day the defendant's Solicitor gave notice that the defendant "exercises his rights under clause 2 of the agreement and the deposit is forfeited."

The plaintiff thereafter instituted this action claiming specific performance of the agreement and in the alternative $9,500 by way of damages.

Held: (1) the stipulation as to time for the subsequent deposit was of secondary importance to the main purpose of the contract;

(2) the condition as to subsequent deposit (of balance of the purchase price) pending completion and registration was required as further evidence of good faith;

(3) although a determinable date ostensibly obligatory was fixed for completion, the nature of the property is such that time for payment of the balance of the purchase price cannot be deemed to be of the essence of the contract;

(4) the purchaser's temporary inability to pay the balance within the stipulated time announcing the reasons for the delay did not constitute any impropriety on his part;

(5) the tender of the balance purchase price within 6 weeks was reasonable in the circumstances and there has been no undue delay;

(6) the purchaser was entitled to specific performance.

Cases referred to:—

(1) *Jamshed Khodaram Irani v. Burjorji Dunjibhai* (1916), 43 I.A. 26.

(2) *Smith v. Hamilton* (1951) 1 Ch. 174.

(3) *Green v. Sevin* 13 Ch.D. 589.

(4) *Re Barr's Contract* (1956) 2 All E.R. 853.

ACTION.

R. R. Chelliah for the plaintiff.

M. Edgar for the defendant.

Cur. Adv. Vult.

Ismail Khan J.: This action arises out of an agreement in writing dated the 7th day of May, 1955, whereby the defendant, as the registered proprietor and beneficial owner of a piece of land comprised in E.M.R. No. 3624 Lot No. 2286, in the Mukim of Setapak, in the Town and District of Kuala Lumpur, agreed to sell and the plaintiff agreed to purchase a defined portion thereof containing an area of approximately 11,700 square feet described as Lot I, upon sub-division of the land into lots and issue

of new title, for the sum of $7,150 and upon terms and conditions specified therein. A sum of $3,650 was deposited with the defendant on the said date in terms of clause 1 of the agreement. Clause 2, over which the main controversy arises, provides:

"On the issue of new titles in respect of Lot No. 1 the vendor shall execute in favour of the purchaser or his nominee a registrable memorandum of transfer of the land comprised in the said Lot No. 1 on payment to the vendor's Solicitors of the balance of Dollars Three thousand five hundred ($3,500) due for the said lot. Provided always that if the purchaser does not deposit the balance of $3,500 with the vendor's Solicitors within fourteen (14) days of the receipt of notice from the vendor of issue of new titles for the said lot I the sum of Dollars Three thousand six hundred and fifty ($3,650) now deposited by the purchaser with the vendor shall be forfeited."

On the 1st day of August, 1957, the then Solicitor for the defendant notified the plaintiff that a title for the said lot No. 1 had been issued and required the plaintiff to deposit with him the balance of $3,500 within 14 days of the receipt of the notice and that the defendant on his part was ready and willing to execute the memorandum of transfer in terms of clause 2. The plaintiff was then unable to deposit the amount on due date as he had lent the money to his sister-in-law, Mrs. Saraswaty Rajaratnam and by his letter dated 5th August, 1957, requested that "the matter be put aside" and that he would pay the required deposit after recovering the said sum. His request was turned down on 10th August, 1957, by the defendant. On the 3rd of September, 1957, plaintiff wrote again to the defendant's solicitor and asked for a further 6 months' time to "settle" the amount. The next day the defendant's solicitor gave notice that the defendant "exercises his rights under clause 2 of the agreement and the deposit is forfeited."

In this action, which was filed on 15th November, 1957, the plaintiff claims specific performance of the agreement and in the alternative $9,500 by way of damages. No *viva-voce* evidence was led before me and the parties relied on the agreement and the admitted correspondence.

The allegation in paragraph 11 of the plaint that the land is now worth $13,000 was traversed in the defence and there is no evidence before me whether the value of the land has appreciated or depreciated since the date of the agreement. There being no evidence either way, I think I am justified in coming to the conclusion that the market value of Lot I has remained steady. I observe here that the initial deposit paid is a little over 50% of the total purchase price.

Apart from the two main defences, to which I shall refer presently, the defendant raised two other defences; (1) the agreement is void for the plaintiff being a Government servant had not obtained the prior consent of the Government to the transaction — a defence that was abandoned at the hearing, in view of the sanction dated 29th June, 1956, procured by the plaintiff. I do not, however, think that the absence of a sanction under the General Orders could render the agreement illegal and unenforceable but it is not necessary for me to decide the question and (2) that the tender of $3,500 was made by the plaintiff's sister-in-law and the tender was not valid. The latter contention is entirely without substance for a cheque for $3,500 issued by her in favour of the defendant was forwarded with a covering letter from the solicitor for the plaintiff in payment and, indeed, the defendant is not at all concerned with the source of money procured by the plaintiff.

The main contentions of the defendant are:

(1) The balance of $3,500 not having been paid within 14 days of the notice, the initial deposit of $3,650 was forfeited under clause 2 and the contract was at an end. Mr. Edgar relied entirely on the letter of 4th September, 1957, which he contended made time of the essence of contract and

(2) No contract being in existence, there was nothing which is capable of specific performance.

The local law as to time being of the essence of the contract is the same as in England. *Jamshed Khodaram Irani v. Burjorji Dunjibhai.* [1] Section 56(1) of our Contracts Ordinance which is the same as section 55 of the Indian Contract Act 1872 provides that

"when a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract."

Lord Haldane in the above case after referring to the Indian section said:

"Their Lordships do not think that this section lays down any principle which differs from those which obtain under the law of England as regards contracts to sell land. Under that law equity, which governs the rights of the parties in cases of specific performance of contracts to sell real estate, looks not at the letter but at the substance of the agreement in order to ascertain whether the parties notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time."....."Their Lordships will add to the statement just quoted these observations. The special jurisdiction of equity to disregard the letter

of the contract in ascertaining what the parties to the contract are to be taken as having really and in substance intended as regards the time of its performance may be excluded by any plainly expressed stipulation. But to have this effect the language of the stipulation must show that the intention was to make the rights of the parties depend on the observance of the time limits prescribed in a fashion which is unmistakable. The language will have this effect if it plainly excludes the notion that these time limits were of merely secondary importance in the bargain, and that to disregard them would be to disregard nothing that lay at its foundation. *Prima facie*, equity treats the importance of such time limits as being subordinate to the main purpose of the parties, and it will enjoin specific performance notwithstanding that from the point of view of a Court of Law the contract has not been literally performed by the plaintiff as regards the time limit specified"....."But equity will not assist where there has been undue delay on the part of one party to the contract, and the other has given him reasonable notice that he must complete within a definite time. Nor will it exercise its jurisdiction when the character of the property or other circumstances would render such exercise likely to result in injustice. In such cases the circumstances themselves, apart from any question of expressed intention exclude the jurisdiction. Equity will further infer an intention that time should be of the essence from what has passed between the parties prior to the signing of the contract."

I wish to observe that the stipulation as to the forfeiture of deposit attaches to the failure to deposit the balance of the purchase price within 14 days of notice by the defendant of the issue of a separate title: payment of the purchase price and completion by way of registration of transfer are simultaneous obligations and admittedly completion must take place at the same time. The balance of $3,500, I take it, was to be deposited with the defendant (as evidence of good faith) pending completion and registration and, thereafter, to be appropriated by him. In my view the stipulation as to time for the subsequent deposit was of secondary importance to the main purpose of the contract. Although a determinable date ostensibly obligatory has been fixed for completion under the first limb of clause 2 of the agreement I am not persuaded, in view of the nature of the property (vacant building land) that time was of the essence of contract. Nor are there any special circumstances from which an intention to make time of the essence may be inferred. In the words of Harman J. in *Smith v. Hamilton* [2] at p. 179:

"There are circumstances in which time can be said to be of the essence of the contract from the beginning. It is well known that time may be of the essence on a sale of licensed premises, or of a shop as a going concern, or, perhaps, it may be so on a sale of animals when they are in a certain place. But it would need very special circumstances to make time of the essence of the contract on a sale of an ordinary private dwelling-house with vacant possession."

If time is not of the essence of the contract can the defendant unilaterally by notice make time of the essence of the contract? In *Green v. Sevin* [3] at p. 599 Fry J. said:

"It is plain upon principle, as it appears to me, that there can be no such right. That which is not of the essence of the original contract is not to be made so by the volition of one of the parties, unless the other has done something which gives a right to the other to make it so. You cannot make a new contract at the will of one of the contracting parties. There must have been such improper conduct on the part of the other as to justify the rescission of the contract *sub modo*, that is, if a reasonable notice be not complied with. That this is the law appears to me abundantly plain."

This statement of the law was adopted by Harman J. in the above case of *Smith v. Hamilton*. [2] The facts which are similar to this case, as set out in the head note, are as follows:

On February 26, 1949, the plaintiff signed a memorandum acknowledging that she had purchased for £3,000 a house belonging to the defendant, subject to the attached conditions. She paid a deposit of £300 to estate agents who held the money as stakeholders. Completion with vacant possession was fixed for April 4, 1949. The conditions of sale adopted the National Conditions of Sale (15th ed.), so far as not inconsistent with the special conditions of sale.

The purchaser, having experienced difficulty in raising the rest of the purchase money, on March 29, 1949, wrote by her solicitors that it would not be possible for her to complete the purchase on "the date fixed by the contract." The vendor thought that the purchaser would be unable to find the money, and on April 5, 1949, wrote by his solicitors that he could not agree to an extension of time to complete and that he reserved all his rights under the contract of sale; but he was, he wrote, prepared without prejudice to delay exercising those rights until April 19. The vendor refused the purchaser's application for an extension of time. By April 19, 1949, she had not completed the sale, and the vendor notified her that, as she had failed to complete, the deposit had become forfeit and the vendor proposed to exercise his right of re-sale forthwith. The purchaser was, by May 4, 1949, in a position to complete the purchase, but the property had been sold on April 21, 1949.

Condition 25(1) of the National Conditions of Sale (15th ed.) provides:

"If the purchaser shall neglect or fail to complete his purchase according to these conditions, his deposit shall thereupon be forfeited (unless the Court otherwise directs) to the vendor.....and the vendor may, with or without notice or without previously tendering a conveyance, re-sell the property at such time, and in such manner and subject to such conditions as he shall think fit."

Harman J. held that the purchaser's letter of the 29th March merely announcing the reasons for the delay in completing did not constitute any impropriety and that if the purchaser's letter of March 29 did so entitle the vendor to

make time of the essence of the contract the vendor's letter of the 5th of April, 1949, did not have that effect and even if it had been intended to make time of the essence of the contract it would have failed to do so as fourteen days were too short a notice.

In this case it is clear that the plaintiff's letter of August 5th, 1957 did not say he could not complete but merely explained his difficulties in completing just on the day fixed and the letter could not therefore constitute the sort of improper conduct that would have entitled the defendant to send a notice to engraft time on the contract. It must also be observed that neither the letter of August 1st nor of August the 10th or September the 4th could or did make time of the essence of the contract for all that the defendant said was that the deposit was forfeited from failure to pay balance of the purchase price. No period was named in any of these letters making time of the essence except by reference to clause 2.

If I am wrong in this and the vendor is entitled to deliver an ultimatum to the purchaser, was the period of 14 days a reasonable notice having regard to the circumstances? On this point I most respectfully adopt the observations of Danckwarts J. in *Re Barr's Contract* [4] at page 857:

> "In naming a period which suddenly makes a definite requirement for completion and makes time of the essence in this way, regard must be had to all the circumstances of the case, and to the practical considerations of the ability of the purchaser in the circumstances to find the money, having regard to reasonable behaviour....."

In the present case at the time the agreement was entered into it was not known when the sub-division of the land would be completed and new titles issued. Notwithstanding this a very substantial amount was paid as initial deposit. The first intimation the purchaser received as to the issue of the new title was the defendant's letter of the 1st August, 1957, after a period of two years which also gave notice for the payment of the balance of the purchase money within 14 days. In the circumstances I do not consider that the period of 14 days is a reasonable period. The purchaser by his letter had already tendered the balance within the not unreasonable period of 6 weeks and now asks for specific performance. As the land is still in the name of the defendant there will be no injustice in ordering specific performance. There will, therefore, be an order for specific performance as prayed upon lodgment into Court by the plaintiff of $3,500 to the credit of this action within seven days. The defendant will pay the costs of the action.

Order accordingly.

Solicitors: *R. R. Chelliah; Bannon & Bailey.*

EVELYN SAW HEE LI v. GAN TIT SUN

[O.C.J. (Rigby J.) January 12, 1959]

[Penang, Summons in Chambers No. 239 of 1958 — Civil Suit No. 218 of 1958]

Landlord and Tenant — "Premises" definition of — Qua land does not come within the definition of "premises."

Practice and Procedure — Specially Indorsed Writ — R.S.C. 1957 O.3 r.6 and O.14 — Leave to defend — When granted.

This was an appeal from an Order of the learned Registrar giving the defendant (now the respondent) leave to defend proceedings brought against him by way of Specially Endorsed Writ dated September 11, 1958, under O. 3 r. 6 of the Rules of the Supreme Court.

The Statement of Claim endorsed upon the Writ was as follows: — "1. The plaintiff is the owner of the piece of land known as Lot 75 Town Subdivision 7 North East District, Penang. 2. The plaintiff is entitled to possession of the land forming part of the said land on which are erected premises known as No. 61, Green Lane, Penang. 3. The defendant was a trespasser or alternatively a licensee or in the further alternative formerly a monthly tenant of the plaintiff in respect of the said land. 4. A Notice to Quit dated 25th July, 1958 and expiring on the 31st day of August, 1958 was given by the plaintiff's Solicitors to the defendant and was served on the defendant on 26th July, 1958. Notwithstanding such Notice to Quit the defendant refuses to vacate the said land. And the plaintiff claims: — Possession of the said land."

On September 24, a Defence was filed in the following terms: — "1. Paragraph 1 of the Statement of Claim is admitted. 2. The defendant has been occupying a part of the plaintiff's on which his premises No. 61, Green Lane, Penang are erected for the past 29 years paying a ground rent first, at 50 cents per month and later at $1 per month. 3. With regard to paragraph 2 of the Statement of Claim the defendant denies that the plaintiff is entitled to possession of the said part of the said land as the defendant is a tenant to the plaintiff paying a ground rent of $1 per month. 4. The defendant denies that he is a trespasser or licensee in respect of the said land as alleged in paragraph 3 of the Statement of Claim and repeats that he is a tenant to the plaintiff in respect thereof. 5. The defendant admits paragraph 4 of the Statement of Claim and will contend that the Notice to Quit is bad in Law. 6. Alternatively, the defendant claims the protection of the Control of Rent Ordinance, 1956."

On September 27 the plaintiff (now the appellant) took out a Summons-in-Chambers under Order 14, returnable before the Registrar on October 2, 1958, applying for leave to sign final judgment. The Summons was